No. 10140

# In the United States Circuit Court of Appeals

## For the Ninth Circuit

MATTHEW EDWARD DEADY, HANOVER DEADY, and THE FIRST NATIONAL BANK OF PORTLAND, a national banking association,

*Appellants,*

vs.

RICHARD HOWELL,

*Appellee.*

RICHARD HOWELL,

*Cross-Appellant,*

vs.

MATTHEW EDWARD DEADY, HANOVER DEADY, and THE FIRST NATIONAL BANK OF PORTLAND, a national banking association,

*Cross-Appellees.*

# APPELLANTS' REPLY BRIEF AND CROSS-APPELLEES' ANSWERING BRIEF

Upon Appeals from the District Court of the United States for the District of Oregon.
HON. JAMES ALGER FEE, *District Judge.*

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STEVENS-NESS LAW PUB CO., PORTLAND

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### Presumption of Meaning of "Death Without Issue"

The basic issue in this case is whether Mrs. Deady, in the Seventh paragraph of her will which provides that "in the event my son Henderson Brooke Deady die without issue, the undivided two-thirds

of Lot numbered 1 in Block numbered 212, shall vest in my grandsons hereinbefore named," intended to provide that the devise over should take effect only in the event of Henderson's death *prior to her own death,* or in the event of Henderson's death without issue *at any time.*

In our original brief (pp. 15-6) we quoted from Mr. Justice Gray's opinion in *Britton vs. Thornton,* 112 U.S. 526, 532-3, as follows:

> "When indeed a devise is made to one person in fee, and in case of his death to another in fee, the absurdity of speaking of the one event which is sure to occur to all living as uncertain and contingent has led the courts to interpret the devise over as referring only to death in the testator's lifetime. * * * But when the death of the first taker is coupled with other circumstances which may or may not ever take place, as, for instance, death under age *or without children,* the devise over, unless controlled by other provisions of the will, takes effect, according to the ordinary and literal meaning of the words, upon death, under the circumstances indicated, *at any time, whether before or after the death of the testator.*" (Italics added.)

We pointed out that the above quotation has twice been quoted with approval by the Supreme Court of Oregon, in *Bilyeu vs. Crouch,* 96 Or. 66, at page 71, 189 P. 222, at page 224; and in *Imbrie vs. Hartrampf,* 100 Or. 589, at page 602, 198 P. 521, at page 525; and also cited with approval in *Shadden vs. Hembree,* 17 Or. 14, at pages 25-6, 18 P. 572, at page 577.

Each of the above three Oregon decisions is discussed in Appellee's Brief (pages 24-6, 29-30, 30-3),

but at no place in that brief, either in the discussion of the Oregon cases or elsewhere, is any notice taken of the Oregon court's repeated approval of the above quotation. In fact, *Britton vs. Thornton* is not even mentioned in the brief.

The Oregon cases are reviewed at some length in Appellee's Brief (23-33), but it is submitted that an utter disregard of the above and other portions of the opinions in those cases, and of the actual holdings therein, is displayed when the brief suggests (p. 34) "that if the question were presented in the Oregon courts today the substitutional rule would be followed." We assert, as we did in our original brief (p. 38), that the Oregon rule is to the contrary. In our original brief (pp. 26-38) we reviewed at length *all* of the Oregon cases which deal with the phrase "die without issue", or words of similar import, and another discussion of them here would be an unjustified repetition. We agree, of course, with appellee that, in the last analysis, the decision of this case depends upon the meaning to be given the language of the will, and, whatever the rule may be, it is but a rule of construction which will yield to a contrary intent derived from the language of the will.

We accordingly proceed to analyze the contentions made by appellee regarding the meaning of the will.

## MEANING OF THE WILL

1. (Appellee's Brief, 39, 41, 47) The first contention is that the provision "subject to like conditions, provisions and charges thereon," in the Fourth paragraph containing the devise to the grandsons, means that no subsequent condition in the will can be construed as applicable to Henderson's devise unless "exactly the same" condition is applicable to the grandsons' devise—that the conditions must be "identical". Surely appellee does not mean this. That contention renders the Seventh paragraph entirely nugatory, even thought it be construed in accordance with appellee's contentions. Of course, the mere reading of the Third and Fourth paragraphs will demonstrate that by the use of the word "like" in the Fourth paragraph the Testatrix intended simply to state that the devise to the grandsons was "subject to the conditions, provisions and charges thereon *hereinafter made*", the word "like" in the Fourth paragraph taking the place of the phrase "hereinafter made" in the Third paragraph.

Furthermore, in the will under consideration in the case of *Stubbs vs. Abel,* 114 Or. 610, 233 P. 852 (referred to in our original brief at pages 18, 20, 39, and in the appendix, page 85) the fact that the testator gave notice in the Sixth paragraph that he might subsequently limit the devise to Mrs. Stubbs, as well as the devises to Richard and Claire Williams, did not prevent the Oregon Supreme Court from giving full effect to the subsequent limitation

placed on the devises to Richard and Claire only.

2. (Appellee's Brief, 6, 43-4) A contention, not presented to the trial court (See Tr. 12-3, 108-10), is that various provisions in the will involving accumulations, restraints, etc., claimed by appellee to be invalid, are so inextricably bound up with the valid provisions that the elimination of the invalid provisions would entirely frustrate the desires of the testatrix, and therefore that the entire will fails. No authorities are cited in support of their contention that the elimination of types of provisions claimed to be illegal will so defeat the general plan as to render the entire will (except the residuary clause) invalid. The provisions referred to are concerned with accumulations and restraints and are not provisions whereby the vesting of title is illegally postponed. The present case presents no situation calling for the application of the rule of law stated by appellee. See *Closset vs. Burtchaell*, 112 Or. 585, 230 P. 554; *Friswold vs. United States National Bank*, 122 Or. 246, 257 P. 818.

3. (Appellee's Brief, 44-6) Naturally the testatrix desired her devisees to have power of alienation after 25 years, but the power of alienation which she desired them to have was only of the estates *actually devised.*

The suggestion on page 45 that if Henderson's title was defeasible "his mortgage" would be unacceptable, is entirely beside the point. Naturally, if the existing mortgage was extended it would be by an extension agreement executed by Henderson,

Hanover, and Matthew, and their respective wives.

4. (Appellee's Brief, 46) The suggestion that testatrix had "little regard" for the rule against perpetuities and related rules of law, and therefore probably wished the expression "death without issue" to have its "settled common law meaning", is, we submit, utterly illogical. If the draftsman of the will violated the rule against perpetuities and "related rules of law", it is more logical to believe that such violation resulted from an ignorance of those rules and that accordingly he also was ignorant of what appellee refers to as "the settled common law meaning" of the expression "death without issue".

5. (Appellee's Brief, 48) The astounding suggestion is made that because Mrs. Deady did not desire the devise to the grandsons to be cut down upon the death of Henderson, therefore she did not desire the devise to Henderson to be cut down upon his own death!

6. (Appellee's Brief, 49-52) In answer to our contention that if the Seventh paragraph be construed as a substitutional devise only it was entirely unnecessary because, if Henderson had predeceased Mrs. Deady, Matthew and Hanover would have taken by intestacy the property devised to Henderson, appellee makes a rather extended and curious argument.

It is first pointed out that (in the absence of the Seventh paragraph) the descent to Hanover and Matthew, in the event Henderson predeceased his mother, would have been from Mrs. Deady and not

from Henderson. We, of course, agree, and, in making our contention (Appellants' Br., 47), we intended to imply nothing to the contrary. It is then pointed out that one of the outstanding features of the will is the "elaborate structure of legacies and restrictions"—provisions for income for daughters-in-law, grandsons, and Henderson, charges against income for inheritance taxes, sinking fund to retire the mortgage, restraint on alienations, etc.—all for the purpose of "keeping the property itself intact, and providing for the family out of the income alone." The contention is then made that if Matthew and Hanover had inherited the two-thirds interest upon a lapse resulting from Henderson's death prior to that of Mrs. Deady, the two-thirds interest would have been free from these charges, provisions, and restraints. And, as the argument goes, there would then have been a frustration of Mrs. Deady's primary desire to keep the property intact "for the family". In addition to the obvious answer that any intent by Mrs. Deady to give this two-thirds interest to Henderson's widow and Henderson's widow's son by another marriage—strangers to Mrs. Deady—can hardly be said to be "keeping the property itself intact, and providing for the family out of the income", we have four answers to the above contention:

First: Had the Seventh paragraph been omitted and had Henderson predeceased Mrs. Deady so that the two-thirds interest would have gone to Matthew and Hanover by intestacy, the dire result which

appellee claims Mrs. Deady foresaw and guarded against would not have taken place anyway. The provisions of the Fifth paragraph for the payment of income from this property are not (as appellee's counsel assume) in any way dependent upon the preceding devises in the Third and Fourth paragraphs. Had all the preceding devises lapsed, the Fifth paragraph would still have remained in full force and effect. A mere reading of that Fifth paragraph discloses that appellee is mistaken in this contention. And while it may be true that the purported "express condition" against alienation in the Sixth paragraph would not have been effective with respect to that two-thirds interest in case of intestacy, it is also clear that the insertion of the Seventh paragraph does not change that result. The condition in the Sixth paragraph reads ". . . the devises . . . . contained in *items three and four hereof,* are upon the express condition . . ." And so, the devise contained in the Seventh paragraph—whether substitutional or anything else—is not made subject to the condition provided in the Sixth paragraph.

Second: If the Seventh paragraph was inserted (as appellee claims) solely for the purpose of making certain that all interests in the property would be subject to these charges and restraints, even in the event of Henderson's predeceasing Mrs. Deady, why then did not Mrs. Deady make a similar provision for the contingency of Hanover's or Matthew's predeceasing her? Exactly the same argument which appellee makes would then be applicable. If some

such provision was necessary in order to insure that the conditions, provisions and charges would apply to Henderson's two-thirds, if he predeceased her, a similar provision was equally necessary in order to insure that they would apply to Matthew's and Hanover's one-third, if they predeceased her.

Third: If Mrs. Deady thought that some safeguard was necessary to perpetuate the conditions, provisions and charges, and inserted the Seventh paragraph only for that purpose (as appellee claims), she certainly chose a most indirect, artificial and unnatural method to accomplish her desired result. Certainly the device and language employed were not such as are reasonably to be expected either of a layman or a lawyer desiring simply to provide that the conditions, provisions and charges should not be affected by any devolution of the title.

Fourth: If some safeguard was necessary to prevent a lapsed devise, it should be noted that the lapsed devise would be prevented just as surely by the construction which we place upon the Seventh paragraph as by the construction which appellee gives it. For we do not contend that the devise over to the grandsons under the Seventh paragraph would take place *only* in the event that Henderson died after the death of Mrs. Deady. We contend that the devise over would have become effective upon Henderson's death "at any time" without issue—either before or after the death of Mrs. Deady. We believe, however, that in inserting the Seventh para-

graph, Mrs. Deady actually had in mind Henderson's death after her own.

7. (Appellee's Brief, 52-60) In our original brief (pp. 42-4), we pointed out that the Eighth paragraph of the will which permitted Henderson to bequeath to his widow, if he left one, the income which he would have received from the property if living, clearly demonstrates that Mrs. Deady did not intend to give Henderson an absolute indefeasible fee in the property, since otherwise the Eighth paragraph would have been entirely unnecessary; and we also suggested (pp. 65-6) that the exercise of this power of appointment by Henderson in his will was a recognition by him that he did not have an indefeasible fee in the property. Appellee's arguments on these points will now be considered.

(a) First it is argued (Appellee's Brief, 53) that even though Henderson held an indefeasible fee, the provisions against alienation, if valid, prevented him from devising that fee to his widow. It is then argued that the power of appointment was "obviously" to enable Henderson to give his widow the income if he died during the 25-year period that the restraint on alienation was to be effective.

In the first place, we very much doubt whether the provision in the Sixth paragraph that this property "shall neither be mortgaged, partitioned, sold, or otherwise encumbered", even when coupled with the later general terms "shall not be disposed of or encumbered", can be construed as forbidding a devise by will. But regardless of this, certainly it

would not be contended that the mere descent of property in case of an intestate death is a violation of such a restraint on alienation (see *Kalyton vs. Kalyton*, 45 Or. 116, page 129, 74 P. 491, 78 P. 332; *Burbank vs. Rockingham Insurance Co.*, 24 N. H. 550, page 558, 57 Am. Dec. 300). Counsel have entirely overlooked the fact that under Oregon law a widow inherits all real property when her husband dies without issue (O.C.L.A., Section 16-101). Nor have they explained away the final sentence of the Eighth paragraph of Mrs. Deady's will: "Such bequest to continue only during the lifetime of the widow of said Henderson Brooke Deady."

Shortly after having asserted that the above was "obviously" the purpose of the Eighth paragraph, it is inconsistently argued (Appellee's Brief, 55) that the power of appointment, if intended to be exercised *after* Mrs. Deady's death, was entirely void for remoteness. As we understand the reasoning, it is that at some remote date in the future Henderson might have married a woman who was not alive at the time of Mrs. Deady's death. It is also said that the charge in the widow's favor might "run for a period greater than 21 years after lives in being at Lucy's death." And since inferences as to Mrs. Deady's intentions have weight only when the suggested possibilities can be said to have occurred to Mrs. Deady, it is stated by appellee that the above possibility is "expressly recognized" by the parenthetical clause "if he then has a wife" in the Eighth paragraph. Without pursuing the matter

through all its ramifications, we merely state that (1) the right of Henderson's widow to the income under the power of appointment would necessarily vest, if at all, immediately upon his death, which was within the time required by the rule against perpetuities; (2) the rule against perpetuities is concerned with the vesting of interests and not with the continuation thereof; and (3) if counsel's argument is sound, then *all* general powers of appointment to be exercised by will are void since in every case the donee of such a power may exercise it in favor of persons not born until more than 21 years after the death of the donor of the power.

(b) In spite of the contention just discussed (that if the power of appointmnt was to be exercised only after Mrs. Deady's death, it was void), it is urged (Appellee's Brief, 54, 60) that even though (as appellee contends) the Sixth paragraph—"die without issue"—refers to Henderson's death prior to his mother's death, the Eighth paragraph providing for the power of appointment could refer to the death of Henderson *after* the death of Mrs. Deady. We submit that when these two paragraphs are read together, and their relative positions in the will and the purposes of each are considered, it becomes very clear that Mrs. Deady intended the Eighth to be a modification of the Seventh, and therefore that she was not referring to the possibility of Henderson's death *prior* to her own in one paragraph and to its possibility *after* her death in the other paragraph. In both cases she was refer-

ring to his death after her own death.

(c) In spite of the assertion in Appellee's Brief (p. 55) discussed above, that Mrs. Deady recognized (by the words "if he then has a wife") that the power of appointment in the Eighth paragraph might be exercised at some remote time in the future, the brief proceeds to argue (pp. 55-60) that if the power of appointment had been exercised prior to Mrs. Deady's death (and therefore prior to the effective date of her will) such an exercise of the power would have been valid. It is apparent that appellee's counsel recognize that such a contention is absolutely essential to their case.

Aside from the language in the Eighth paragraph indicating that that paragraph, like the remainder of the will, spoke only from the date of Mrs. Deady's death (being in accord with the legal presumption in that respect; see our original brief, p. 22) appellee is met with the insuperable obstacle that a power of appointment cannot be exercised until the power comes into being. We pointed this out in our original brief (pp. 21-2, 43); but appellee's counsel refuse to concede that a power of appointment given in a will cannot be exercised prior to the death of the maker's will. They refer to authorities (pp. 56-7) which support them not at all, but hold merely that a power may be exercised by a will *executed* prior to the creation of a power, or "by a will *of prior date*". The question here is not whether Henderson could have exercised the power by a will *executed* by him prior to his mother's

death. The question is whether he could have exercised the power if he *had died* before her death. The cases cited by appellee (pp. 56-7), together with other cases, are cited in 1 Scott on Trusts, Section 54.4, where the learned author makes the obvious explanation:

> "In all these cases there is no difficulty since the donor of the power predeceased the donee."

But, counsel insist (pp. 57-60), the same result may be reached by the application of "the doctrine of *incorporation by reference*"— by which we understand them to mean that Mrs. Deady in the Eighth paragraph intended to incorporate, by reference, the provisions of her son's will, not yet executed. Counsel have entirely disregarded the well established rule that incorporation by reference can only take place when the document incorporated is already in existence and is specifically described. *Gerrish vs. Gerrish,* 8 Or. 351; *Boehmer vs. Silvestone,* 95 Or. 154, 172, 186 P. 26; *Witham vs. Witham,* 156 Or. 59, 65, 66 P. (2d) 281, 110 A.L.R. 253, 257; Atkinson Law of Wills, 332, 335; Jarman on Wills, 7th Ed., 124; Page on Wills, 2nd Ed., Sections 248-51; Schouler, Wills, Executors, and Administrators, 6th Ed., Sections 400-7; Thompson on Wills, 2nd Ed., 137, 138.

Nor does the New York case of *In re Fowles' Will,* 222 N.Y. 222, 118 N.E. 611, quoted on pages 58-9 of appellee's brief, in any way aid appellee's contention as to incorporation by reference, as a

mere reading of the quoted portion will disclose. There a husband had granted to his wife a power of appointment. He provided that in the event he and his wife should die in a common disaster he should be deemed to have predeceased his wife. The question was whether the latter provision was valid, and the court held it was.

No amount of argument can, we submit, overcome the obvious fact that the Eighth paragraph of the will conclusively demonstrates that the death of Henderson referred to in the Seventh paragraph had reference to his death subsequent to Mrs. Deady's death, or more probably to his death "at any time"—if indeed a mere reading of the Seventh paragraph itself is not alone sufficient to show her clear intention to that effect.

(d) Appellee also contends that the fact that Henderson later exercised the power by his will is "of no great aid to defendants."

We believe that what we have said above and in our original brief sufficiently demonstrates that Henderson's exercise of the power was the solemn recognition by him that Charlotte would otherwise receive nothing from the property. But counsel argue (p. 54) that even though the restraint on alienation "was not legally binding on him", he apparently recognized it "as a moral obligation". But it must not be forgotten that plaintiff contends (Tr. 10, 11), and defendants admit (Tr. 66), that if Henderson had an indefeasible absolute fee in the property, that fee was devised to Charlotte *by Henderson in*

*the very will which contained the exercise of the power of appointment* and in which counsel now contend Henderson "apparently recognized" the restraint on alienation as "a moral obligation". True, it was devised by the general residuary clause, but if (as appellee now contends) Henderson both (1) believed he had an absolute fee simple title and (2) recognized and endeavored to abide by a moral obligation not to devise it, he surely would have avoided doing so even by general words. But, of course, if he had such a title, neither the provision giving Charlotte the income for life, nor the general devise was necessary to give Charlotte either the income or the fee simple title since without them Charlotte would have obtained both as the statutory heir of Henderson.

8. (Appellee's Brief, 61, 62) It is next contended (page 61) that the fact that Henderson is given two-thirds of the residue, and (as appellee contends) was "the chief object of the testatrix' bounty" (p. 62) indicates that she intended Henderson to have an absolute and indefeasible fee in Lot 1, Block 212. In our original brief (pp. 52-3) we commented upon a similar argument advanced by the trial court; but when appellee concedes, as he must and does, that Mrs. Deady believed she had effectively provided that the property could not be encumbered or alienated but had to be kept "for the family", appellee answers his own argument. For then the question becomes not whether Henderson was a chief object of his mother's bounty, but whether

some future wife and widow of Henderson and that widow's son—strangers to Mrs. Deady—were chief objects of Mrs. Deady's bounty. And when it is recalled that at the time of the execution of Mrs. Deady's will, Henderson was living apart from his wife Amalie, and desired a divorce, and planned to marry Charlotte, and that this conduct and this desire and this plan all met with the disapproval of Mrs. Deady (Tr. 267-9), need more be said?

9. (Appellee's Brief, p. 61) It is contended that the fact that Mrs. Deady named Henderson and Joseph Simon as co-executors indicates she had in mind the contingency of Henderson not surviving her. This argument presupposes that she really preferred Henderson as her executor to Joseph Simon and that she added the latter to care for the contingency of Henderson's death. The converse argument, we submit, is just as logical; but in any event the members of this court will doubtless agree that the usual and appropriate provision to take care of the contingency suggested by appellee is to name not co-executors but alternate executors. The draftsman of the will apparently understood this, for he named the Bank as *alternate* executor and trustee in the event of the "death, resignation, or disqualification" of both the executors and trustees.

In fact, as we pointed out in our original brief (p. 47), the authorities declare that by naming Henderson as an executor, Mrs. Deady indicated that the provision for the gift over upon his death had reference to his death subsequent to her death.

## CONCLUSION

Much stress has been given both by the learned trial judge (Tr. 41, 58-9, 114, 454-5) and by learned counsel for appellee (Br. 51-5, 62-3) to the comprehensive plan set forth by Mrs. Deady in her will to keep this property intact, free from encumbrances and immune from alienation. We likewise stress that plan. Both the learned trial judge (Tr. 120, 454-5; see also appellants' brief, 54) and appellee's counsel (Br. 62) advert to the fact that the primary purpose of this comprehensive plan was better to provide "for the family"—the trial judge (Tr. 120) recognizing also a purpose "to have the property kept intact as a monument to Judge Deady".

On one important point, however, there is a sharp divergence between appellee's brief and the opinions of the learned trial judge. The learned trial judge recognized that if Mrs. Deady's intention, as disclosed by her will, could be given effect, Hanover and Matthew should now be declared the owners of this property and plaintiff the owner of no part thereof, but he felt that some rule of law prevented him from carrying out his intention (Tr. 47-60, 120, 454-5; see appellants' brief 53-4, 68-70, 73-4). Appellee's brief simply denies that such was Mrs. Deady's intention. It does not contend (aside from the argument regarding the result of the alleged illegal restraints and provisions for accumulations) that if such intention should be found there is any rule of law to prevent a court from carrying that intention into effect.

The appellee has advanced no good reason (except that he wants the property) why this Court should hold that Mrs. Deady, in the Seventh paragraph of her will, was referring only to Henderson's death prior to her own death.

The Supreme Court of the United States in *Britton vs. Thornton, supra,* 112 U.S. 526, has held that the natural and literal meaning of the words used by Mrs. Deady is death at any time, whether before or after the death of the Testator. This has been cited with approval once and quoted with approval twice by the Oregon Supreme Court, the last quotation being in *Imbric vs. Hartrampf,* the last occasion on which the Oregon court had the matter before it for consideration.

Taking the will by its "four corners" this interpretation is strengthened by the notification given at the outset of the Third paragraph of Mrs. Deady's will that Henderson's devise was "subject to the conditions, provisions and charges thereon hereinafter made", and by the provision of the Eighth paragraph of the will giving Henderson a power of appointment by his will to his wife of the income from two-thirds of the property for her lifetime, which power would not only have been unnecessary had she intended Henderson to have an absolute fee simple interest in the property if he survived her, but it would have been entirely ineffectual had he predeceased her.

Henderson Deady himself construed the will to give him only a defeasible fee which would be de-

feated upon his death without issue, because he so represented to Hanover Deady on several occasions; implemented this interpretation by giving Hanover an affidavit (Ex. H, Tr. 322) that he had no children at that time who would prevent him from dying without issue (Tr. 316); and represented to his wife's lawyer (after consultations with his own lawyer) that he had only a power of appointment under his mother's will (Tr. 225, 226).

In Henderson's own will, executed more than nine years after his mother's death (Ex. 1, Tr. 199), Henderson expressly referred to the power of appointment, and he exercised it in favor of his wife, Charlotte, making no mention of any other interest in Lot 1, Block 212.

The executor of Henderson's will, both in the Petition for Probate (Ex. A, Tr. 208) and, two years later, in the Inventory and Appraisement (Ex. B, Tr. 214), he being represented on both occasions by Robert F. Maguire (counsel for appellee in this case) as legal counsel, swore that the only assets of the Estate consisted of two lots in Mountainview Park, Portland, having a value of $100.00.

And so we say that appellee has given no valid reason why the will of Lucy A. H. Deady should not be construed in the manner in which it reads, in the manner in which the evidence shows she intended it, and in the manner in which Henderson Deady, through whom appellee is claiming, construed the will during the ten years in which he survived his mother and in his own will left upon his death.

## CROSS-APPELLEES' ANSWERING BRIEF

The cross-appellant urges that the trial court erred in denying to him any right to the present income from Lot 1, Block 212, City of Portland, during the lifetime of Marye Thompson Deady, the court having held that a trust was created by the stipulation of October 28, 1925, executed by the executors and beneficiaries under the will of Lucy A. H. Deady (Defendant's Ex. E, Tr. 307). It is somewhat difficult for us to argue this question, because we do not agree with the trial court that the stipulation (which settled the suit brought by Marye) *created* a trust, but say rather that it *recognized the existence* of a trust which had already been created by the will of Lucy A. H. Deady, and simply modified some of its terms by (among other changes) increasing the monthly benefits to Marye and extending them for the remainder of her life, instead of, as provided in the will, until she remarried.

If it did create a trust, however, the cross-appellant was not a party to the stipulation and there is no provision in the stipulation giving to him any income from the trust. He is therefore not entitled to any of the income from the property during the duration of the trust.

In any event it is clear that he is entitled to none of the income which may heretofore have accrued, nor to any which may be realized as long as the estate of Henderson is open. This emphasizes our contention that Henderson's executor is a necessary party to this case.

Respectfully submitted,

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